ME Comm
118423

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-200642 DATE: May 18, 1982

MATTER OF: Civilian Employee of the Department of the Air Force - Disposition of Suspected Fraudulent Per Diem Claim - Reconsideration

DIGEST:

1. On April 7, 1981, after deciding certain legal issues, GAO remanded this case to the Department of the Air Force for a recalculation of the amount of suspected fraud and a determination of number of days for which fraudulent information was submitted on a temporary duty voucher by a civilian employee. The parties have raised several issues concerning the recalculation. Accordingly, we will set forth the governing legal principles and procedures and return the case to the Air Force for appropriate action consistent with this and our previous decision.

2. The burden of establishing fraud rests upon the party alleging the same and must be proven by evidence sufficient to overcome the existing presumption of honesty and fair dealing. Circumstantial evidence is competent for this purpose, provided it affords a clear inference of fraud and amounts to more than a suspicion or conjecture. If, in any case, the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is required to be drawn. Accordingly, a mere discrepancy or inaccuracy, in itself, cannot be equated with an intent to defraud the Government.

3. The framework for the recalculation necessary in the present case is the lodgings-plus method of determining per diem expenses. Under this method, fraud cannot be established merely because

claimant's claimed daily cost for lodging on any one day is more than the average cost of lodging. Thus, fraud cannot be established merely by showing a deviation from an average or estimated figure.

4. In calculating the average cost of lodging under lodgings-plus method of the Federal Travel Regulations (FTR), the term "total amount paid for lodgings" does not include amounts paid by claimants for days when fraud in any amount was committed, and the term "number of nights for which lodgings were or would have been required" does not include those nights tainted by fraud in any amount. 60 Comp. Gen. 181 (1981) and 60 id. 53 (1981) distinguished.

This case was originally decided by our Office in Civilian Employee of the Department of the Air Force, 60 Comp. Gen. 357 (1981). After deciding certain legal issues, we remanded the case to the Department of the Air Force for a recalculation of the amount of suspected fraud and a determination of the number of days, if any, for which fraudulent information was submitted. Because the parties have raised several questions concerning the recalculation, we will set forth below the proper procedures to be followed in the disposition of this suspected fraudulent per diem claim, and remand it again to the Air Force for appropriate action in accordance with this opinion.

The facts of this case, which are more fully set forth in our previous decision, are as follows. The claimant is a civilian employee of the Air Force ("Employee") at McClellan Air Force Base, California. From approximately May 28, 1974, to September 30, 1974, Employee was on temporary duty (TDY) at Jacksonville, Florida, and from approximately October 1, 1974, to March 10, 1975, he was on TDY at Otis AFB, Massachusetts.

He then returned to McClellan AFB, and on March 19, 1975, he submitted travel voucher No. T-23115, in which he claimed total per diem expenses of $6,588, consisting of $3,465 for lodging, and $3,123 for meals and incidental expenses. The then maximum per diem rate was $25, consisting of $13.20 for lodging and $11.80 for meals and incidentals.

At some later date, a suspicion arose that Employee's claim for lodging was false in part. The Air Force Office of Special Investigations (AFOSI) and the Federal Bureau of Investigation (FBI) investigated and concluded that he had defrauded the Government by approximately $1,000. After a jury trial on criminal fraud charges in the U.S. District Court for the Eastern District of California in August 1978, he was found not guilty of the charges.

In the meantime, on June 30, 1978, the Air Force Accounting and Finance Officer (AFO) determined the travel claim to be false and administratively initiated a recoupment action for $6,588, the entire per diem portion of the voucher. Since that date various amounts per pay period have been and are being deducted from Employee's pay.

In our prior decision, after deciding that Employee's acquittal on criminal charges does not bar the Government from claiming in a later civil or administrative proceeding that certain items on his voucher were fraudulent, and that the severability rule announced in 57 Comp. Gen. 664 (1978) is applicable to this case, we observed that:

> "The record submitted by the Air Force contains three different estimates of the amount of fraud varying between $823 and $1,000, and merely states conclusions as to to the various items allowed or disallowed without sufficiently explaining the reasons therefor." 60 Comp. Gen. 357, 360 (1981).

After noting further specific difficulties with the record, we remanded this claim to the Air Force:

> "Employee's per diem claim is remanded to the Air Force for a recalculation of the suspected fraud and a determination of the number of days for which fraudulent information was submitted. In performing this task it should be borne in mind that the regulations at the time these events occurred did not require lodging receipts. Then, in accordance with this opinion he should be allowed per diem for the days for which no fraud is involved."
> Id. at 361.

After the Air Force performed the recalculation, Employee, through his counsel, requested that our Office implement our previous decision due to an alleged non-compliance with it by the Air Force. We have reexamined this matter, and have had informal contact with the parties on it. We believe that the proper resolution of this case requires that we remand it again to the Air Force. We will set forth below some of the relevant legal principles concerning disposition of suspected fraudulent per diem claims as they relate to the recalculation submitted by the Air Force, and provide specific instructions as to the method of properly calculating this claim.

The Federal Travel Regulations (FTR) (FPMR 101-7, May 1973) expressly provide in paragraph 1-11.1 that "[a] claim against the United States is forfeited if the claimant attempts to defraud the Government in connection therewith, 28 U.S.C. 2514." However, in order to establish fraud which would support the denial of a claim or, as here a recoupment action in the case of a paid voucher, our Office has observed that:

> "'[T]he burden of establishing fraud rests upon the party alleging the same and must be proven by evidence sufficient to overcome the existing presumption in favor of honesty and fair dealing. Circumstantial evidence is competent for this purpose, provided it affords a clear inference of fraud and amounts to more than a suspicion or conjecture. However, if, in any case, the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is required to be drawn.' B-187975, July 28, 1977." 57 Comp. Gen. 664, 668 (1978).

A mere discrepancy or inaccuracy, in itself, cannot be equated with an intent to defraud the Government. 57 Comp. Gen. at 668.

The framework for the recalculation necessary in the present case is the lodgings-plus method of determining per diem expenses. At the time of the events in the present case, para. 1-7.3(c) of the Federal Travel Regulations, in relevant part, provided:

> "c. When lodgings are required. For travel in the conterminous United States when lodging away from the official station is required, agencies shall fix per diem for employees partly on the basis of the average amount the traveler pays for lodgings. To such an amount (i.e., the average of amounts paid for lodging while traveling on official business during the period covered by the voucher) shall be added a suitable allowance for meals and miscellaneous expenses. The resulting amount rounded to the next whole dollar, if the re. lt is not in excess of the maximum per diem, shall be the per diem rate to be applied to traveler's reimbursement in accordance with applicable provisions of this part. If the result is more than the maximum per diem allowable, the maximum shall be the per diem allowed. No minimum allowance is authorized for lodging since those allowances are based on actual lodging expenses. Receipts for lodging costs may be required at the discretion of each agency, however, employees are required to state on their vouchers that per diem claimed is based on the average cost to him for lodging while on official travel within the conterminous United States during the period covered by the voucher."

The Air Force's recalculation determined the average cost of lodging to be $12.07 on the basis of Employee's own figures by dividing the number of nights for which lodgings were or would have been required while away from the official station (287 nights) into the total amount claimed to be paid for lodgings ($3,465). Furthermore, the Air Force then disallowed every day on which Employee's claimed costs for lodging exceeded $12.07. It thus found 205 "fraudulent" days, and 82 "nonfraudulent" days.

The above method is unsatisfactory for two reasons. First, if Employee committed fraud by padding his lodging costs, as the Air Force charges, the figure of $3,465 is inflated, and thus the Government would be cheated by using that figure in the computation of the average cost of lodging. Secondly, even if the average cost of lodging figure of $12.07 were accurate, a "fraudulent" day is not established, as the Air Force's recalculation purports to do, merely because Employee's claimed daily cost for lodging (including utilities) on any one day is more than the average cost of lodging. Under the lodgings-plus method, there is simply no requirement that the actual daily cost for lodging be the same or less than the average cost of lodging. Indeed, some variation in the daily cost for lodging is not uncommon, especially during TDY for a long period, and FTR para. 1-7.3(c) even anticipates this situation. See 60 Comp. Gen. 181, 186 (1981). In sum, fraud cannot be established merely by showing a deviation from an average or estimated figure.

In order to properly resolve the present case, we believe the Air Force should follow the following procedures.

First, identify the days in connection with which fraud in any amount was committed (tainted days), and the days for which no fraud was committed (untainted days). The entire per diem amount for the tainted days must be disallowed. Per diem under the lodgings-plus system includes all charges for lodging, meals and other expenses, and a fraudulent representation of lodging costs taints the entire per diem claim for a given day. 59 Comp. Gen. 99, 101 (1979); B-200838, April 21, 1981.

In identifying tainted days, if the Government wishes to rely on matter in reports of investigative agencies such as the FBI or the AFOSI in order to establish that fraud was committed, Employee must be allowed to have a genuine opportunity to examine and rebut the contents of such material. In this regard, we observe that the regulations at the time these events occurred did not require lodging receipts. See paragraph C8101 of Volume 2, Joint Travel Regulations (change 103, May 1, 1974).

Secondly, apply the lodgings-plus formula in FTR para. 1-7.3(c). We note that, subsequent to the events in this case, clarifications have been made in the wording of the formula but its original meaning has not changed. Accordingly, the following formula is from FTR para. 1-7.3(c) (FPMR 101-7) (September 1981), the version presently in effect:

(1) Average cost of lodging = Total amount paid for lodgings / Number of nights for which lodgings were or would have been required (excluding tainted nights)

(2) Per diem rate (properly adjusted) (rounded to next whole dollar, and subject to then maximum of $25) = Average cost of lodging + Allowance for meals and miscellaneous expenses (then $11.80)

(3) Per diem allowance due employee = Per diem rate x Number of untained days for which per diem is allowed

Finally, since Employee has been paid $6,588, we must add the following formula:

(4) Amount to be recouped by Government = $6,588 - Per diem allowance properly due employee

Of course, Employee should be given credit for any amount which has already been recouped, and necessary adjustments should be made by the Air Force to reflect this in his accounts.

In applying the above formula, the following should be borne in mind. In Step (1), the average cost of lodging cannot include nor be based on any tainted day. This is so even if the actual amount expended on lodging for the tainted days is known. See 59 Comp. Gen. 99, 101 (1979); B-200838, April 21, 1981; B-196364, January 6, 1981. Thus, when any day is determined to be tainted by fraud, all expenditures for per diem on that day are excluded entirely from the calculation. A benefit (per diem allowance due employee) should neither accrue nor be based on a fraudulent claim (tainted lodging claim for certain days). Accordingly, in calculating the components of the average cost of lodging, the term "total amount paid for lodgings" does not include amounts paid on tainted days, and the term "number of nights for which lodgings were on would have been required" does not include those nights on which fraud occurred at any time during that day. In cases such as 60 Comp. Gen. 181, 185-86 (1981) and 60 id. 53, 55 (1981) where we have referred to the term "total amount paid for lodgings," fraud was not involved, and, thus, those cases are distinguishable from the present case.

As to Step (3) of the formula, we note the emphasized words in the phrase "number of untainted days for which per diem is allowed " are an important qualification because Employee's travel order did not authorize his privately owned vehicle (POV) as advantageous to the Government. Invoking the constructive cost of common carrier rule, the Air Force's recalculation has thus disallowed an additional 12.5 days for various periods of Employee's TDY. See para. C10157 Volume 2, Joint Travel Regulations (change 103 May 1, 1974); FTR para. 1-4.1 et seq. (FPMR 101-7) (May 1973). Thus, these 12.5 disallowed days must be subtracted from the number of untainted days and the process should proceed as noted above.

Accordingly, we remand Employee's per diem claim to the Air Force for appropriate action consistent with this decision and our previous decision.

for Milton J. Socolar
Comptroller General
of the United States